Filed 7/8/13 In re Chloe J. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re CHLOE J., a Person Coming Under the Juvenile Court Law.	
TULARE COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. JESSICA J., Defendant and Appellant.	F066387 (Super. Ct. Nos. JJV064753A & JJV064753B) **O P I N I O N**

THE COURT[*]

APPEAL from orders of the Superior Court of Tulare County. Jennifer Shirk, Judge.

Jesse F. Rodriguez, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen Bales-Lange, County Counsel, John A. Rozum and Carol E. Helding, Deputy County Counsel, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Gomes, J., and Poochigian, J.

INTRODUCTION

Jessica J., mother, appeals from the juvenile court's orders pursuant to Welfare and Institutions Code section 366.26 terminating her parental rights to Chloe J. and Phillip J.[1] Mother argues that the Tulare County Health and Human Services Agency (agency) failed to make a proper inquiry of her children's Indian ancestry pursuant to the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.). We reject mother's contention and affirm the juvenile court's orders.

FACTS AND PROCEEDINGS

Initial Petition

On May 27, 2010, a petition was filed pursuant to section 300 on behalf of Chloe J., who was born in November 2009, alleging that mother's substance abuse rendered her unable to care for Chloe, mother failed to adequately provide shelter and medical care to Chloe, mother's residence was unsafe, was filthy and smelled, and mother was being evicted. The petition alleged that Chloe's father was incarcerated at the time of detention.

Mother reported to the agency that she was not a registered member of a tribe, but she may have Indian ancestry. The father reported that his mother and grandmother may have Blackfoot and Cherokee ancestry, but no one in his family received services from an American Indian tribe. The agency's report prepared for the detention hearing stated there was insufficient reason to believe Chloe was a child covered by the ICWA.

At the detention hearing on May 28, 2010, the juvenile court noted that both parents had indicated they may have some American Indian ancestry. The court asked both mother and the father whether either one of them believed that Chloe would be

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[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

eligible for membership in an Indian tribe. Both parents replied "No" to the court's question. The parents' counsel did not argue the applicability of the ICWA. The juvenile court ordered Chloe's detention and found that the ICWA was not applicable to her.

The agency's report for the jurisdiction/disposition hearing noted the juvenile court ruled at the detention hearing that the ICWA did not apply. The agency's recommended order was a proposed finding that the ICWA did not apply. Prior to the hearing, both parents executed forms waiving their rights and submitting the matter on the basis of the agency's reports.

On July 1, 2010, the juvenile court sustained the petition, ordered reunification services for both parents, and adopted the proposed findings and orders of the agency that the ICWA was not applicable. Both parents executed a document acknowledging that they had been informed of their right to appeal the findings and orders of the juvenile court. Neither parent filed an appeal.

Supplemental Petition

On July 28, 2010, the agency filed a supplemental petition again seeking to detain Chloe after mother left an inpatient substance abuse program. At the July 29, 2010, detention hearing on the supplemental petition, the juvenile court again detained Chloe and adopted the agency's proposed orders, which included a finding that the ICWA did not apply in this proceeding.

A jurisdiction hearing was held on August 19, 2010. The parents again submitted the matter on the basis of the agency's reports. The court found the allegations of the supplemental petition to be true. The agency's report for the disposition hearing noted the court had already ruled that the ICWA did not apply.

At the disposition hearing on September 1, 2010, the court adopted the agency's recommendations and proposed orders. Neither parent offered any evidence in addition to the agency's reports nor was there any argument concerning the ICWA. Although an

express order concerning the ICWA was not included in the agency's proposed orders adopted by the juvenile court, the court did adopt the proposal that "[a]ll prior orders not specifically set aside or modified remain in full force and effect."[2] The parents executed forms indicating they had been notified of their right to appeal. Neither parent appealed the juvenile court's orders.

New Dependency Petition

In February 2011, mother tested positive for methamphetamine while she was pregnant. In April and May of 2011, mother tested positive for opiates during her pregnancy.

In June 2011, the agency filed a new dependency petition after mother gave birth that month to Phillip J. The petition alleged that mother and Phillip tested positive for controlled substances when he was born. The petition alleged that Phillip was at risk due to mother's drug dependency and the father's inability to protect Phillip from mother. The agency filed a report indicating that the ICWA did not apply.

On June 24, 2011, the court found a prima facie case and detained Phillip. During the hearing, both parents indicated that they were not eligible for membership in a Native American Indian tribe. The juvenile court found insufficient evidence that the ICWA was applicable to Phillip.[3]

The agency's jurisdiction/disposition report for Phillip recommended no reunification services for mother and placement of Phillip with the father. Mother filed a form waiving most of her rights and submitting the matter on the agency's report. At the jurisdiction/disposition hearing on July 28, 2011, the court found the allegations of the

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[2] The court continued reunification services for both parents.

[3] At a review hearing for Chloe on July 8, 2011, the juvenile court terminated mother's reunification services after making findings that she failed to complete substance abuse programs as part of her case plan.

new petition true. The court adopted the agency's recommendation that mother not receive reunification services and placed Phillip with the father, who was to receive family maintenance services.

Although the juvenile court did not make an express finding concerning the applicability of the ICWA, the court adopted the recommended order of the agency that prior orders not set aside or modified remained in full force and effect. Both parents executed a document explaining to them their right to appeal. Neither parent appealed the juvenile court's rulings.

Subsequent Section 387 Petition

In early May 2012, the father, mother, and the children were registered together in a hotel. On May 7, 2012, the father was arrested. The children were not with him. Social workers learned that mother had also been arrested for an incident unrelated to the father. The children resided with mother for at least two days after the father's arrest.

The agency filed a supplemental 387 petition and the court ordered the children's detention on May 21, 2012. The agency's report for the jurisdiction/disposition hearing stated that the ICWA did not apply. At the jurisdiction/disposition hearing on June 21, 2012, the juvenile court found the allegations in the supplemental petition to be true.

The court adopted the agency's proposed orders, including a finding that the ICWA was not applicable to the children. Mother's reunification services had earlier been terminated. The court denied the father reunification services. The court set the matter for a section 366.26 hearing and the parents were both served with forms advising them of the necessity to file a writ to challenge the juvenile court's orders. The parents did not appeal or file extraordinary writ petitions challenging the juvenile court's orders or findings. On October 31, 2012, the juvenile court terminated mother's and the father's parental rights.

Section 388 Petitions

Mother filed three section 388 petitions during the course of the proceedings. Although mother challenged various orders by the juvenile court, she never challenged its rulings that the ICWA did not apply to her children.

ICWA CHALLENGE

Mother argues the ICWA notice was insufficient because the agency did not perform an adequate inquiry into mother's and the father's Indian heritage. Mother acknowledges that she failed to appeal from prior orders of the juvenile court's finding that the ICWA was not applicable to the children. Mother requests that we revisit and overrule our opinion in *In re Pedro N.* (1995) 35 Cal.App.4th 183, 185, 189 (*Pedro N.*), which applies waiver and forfeiture to parents who wait until the termination of parental rights to first make an ICWA challenge. Respondent argues that this case is controlled by our decision in *Pedro N.* We agree with respondent and reject mother's belated ICWA challenge.

In *Pedro N.*, *supra*, 35 Cal.App.4th at pages 185, 189, we held that a parent who fails to timely challenge a juvenile court's action regarding the ICWA is foreclosed from raising ICWA issues, once the juvenile court's ruling is final, in a subsequent appeal from later proceedings. The proper time to raise such issues is after the disposition hearing. The juvenile court's rulings and findings at the disposition hearing are appealable upon a timely notice of appeal. We noted in *Pedro N.* that the parent there was represented by counsel and failed to appeal the juvenile court's orders from the disposition hearing. (*Pedro N.*, *supra*, 35 Cal.App.4th at pp. 189-190.)

Although mother and the father signed forms earlier in the proceedings that they may have Indian heritage, both parents stated during hearings that they were not members of any tribe or eligible for tribal membership. In the instant action, the juvenile court's findings that the ICWA was inapplicable to these children was made at the disposition

hearings conducted on July 1, 2010, September 1, 2010, July 28, 2011, and on June 21, 2012. Sometimes the court's ICWA findings were based on earlier findings at a detention hearing that the ICWA was inapplicable. Mother never challenged the agency's proposed order that the ICWA was inapplicable to her case and mother's counsel never argued that the ICWA was applicable. The father took the same posture as mother during hearings, never challenging the juvenile court's findings that the ICWA was inapplicable to their children.

Both parents were informed at the end of the disposition hearings of their right to either appeal, or file an extraordinary writ, to challenge the juvenile court's findings and orders. Neither parent appealed or filed an extraordinary writ despite multiple opportunities to do so. Mother filed three section 388 petitions for modification of the juvenile court's orders, but never challenged the juvenile court's ICWA findings.

The juvenile court's dispositional findings and orders became final and, on this appeal from the order terminating mother's parental rights, are no longer subject to attack. (*Pedro N., supra,* 35 Cal.App.4th at pp. 185, 189-191.) Our holding in *Pedro N.* is fully applicable here. Mother waited until the end of the proceedings to object to the juvenile court's earlier rulings finding the ICWA inapplicable to this case, and by her prior silence, has forfeited her right to complain about any procedural deficiencies in compliance with the ICWA in the instant appeal.

To the extent mother relies on cases such as *In re Marinna J.* (2001) 90 Cal.App.4th 731, 737-739, *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, and *In re B.R.* (2009) 176 Cal.App.4th 773, 779, cases that disagreed with *Pedro N.*, relying on the theory *Pedro N.* is inconsistent with the protections and procedures afforded by the ICWA to the interests of Indian tribes, we are not persuaded (see also *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 783-785; *In re Antoinette S.*

(2002) 104 Cal.App.4th 1401, 1413-1414). We decline mother's invitation to revisit our holding in *Pedro N.*

We further note that *Pedro N.* does not foreclose a tribe's rights under the ICWA due to a parent's forfeiture or waiver of the issue for failing to file a timely appeal when procedurally entitled to do so at the conclusion of an earlier proceeding. (*Pedro N., supra*, 35 Cal.App.4th at pp. 185, 189-190; see *In re Desiree F.* (2000) 83 Cal.App.4th 460, 477-478 [wherein we reversed the juvenile court's denial of a tribe's motion to intervene after a final order terminating parental rights and invalidated actions dating back to outset of dependency that were taken in violation of ICWA].) In *Pedro N.*, we held we were addressing only the rights of the parent to a heightened evidentiary standard for removal and termination, not those of the tribe (*Pedro N., supra*, 35 Cal.App.4th at p. 191), or, for that matter, the rights of the child. As a result, we conclude mother has forfeited her personal right to complain of any alleged defect in compliance with the ICWA.

DISPOSITION

The orders and findings of the juvenile court are affirmed.